CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF LOUISIANA.

EASTERN DISTRICT, APRIL TERM 1817.

East'n. District. *April* 1817.

DUNN vs. *BLUNT.*

DUNN vs. BLUNT.

A *dedimus potestatem* is not necessarily to be directed to a magistrate.

When it is so directed, no proof is required of the commissioner being a magistrate.

Appeal from the court of the third district.

MATHEWS, J. delivered the opinion of the court. This case comes up on a bill of exceptions to an opinion of the district court, in refusing to admit as evidence the deposition of a witness, taken in execution of a commission, which had previously issued, from the court to William Ragan, said to be a justice of the quorum of the county of Wilkinson, in the Mississippi territory.

The reason for rejecting the deposition is that it was unaccompanied with the certificate of the governor, or any other proper authority, attesting that the said Wm. Ragan is a justice of the

East'n. District. *April* 1817.

DUNN vs. BLUNT.

quorum, altho' the commission was directed to him as such.

We are of opinion that the district court erred, for two reasons. 1. Because it was not necessary that the commission should be directed to a justice of the quorum of the county or territory in which the witness was to be examined. 2. Because if it was, he is acknowleged as such by the commission. The act of our legislature, in 1813, with regard to the taking of depositions of witnesses, who reside out of the parish in which a suit is prosecuted, authorises a commission for that purpose to be directed to a magistrate or other person of the parish wherein the witness resides. It is the commission of the court, in which the suit is pending, that gives to the person, requested to execute the trust reposed in him, authority to examine the witness, and consequently the right of doing every thing necessary to a proper exercise of the power delegated. In this view of the subject, the circumstance of stating in the commission that the person to whom it was directed is a justice of the quorum, in the Mississippi territory, may be considered as surplusage.

But at all events, the court ought not to have

required proof, of that which by its own act is admitted to be true.

It is, therefore ordered, adjudged and decreed, that the cause be sent back to the district court, from which it came, to be again tried, with instructions to the said court to admit the said deposition of the witness Sellers, as evidence in the cause, if there be no other legal objection to it than what appears on the present bill of exceptions.

Carleton for the plaintiff, *Ellery* for the defendant.

FLECKVER vs. *GRIEVE'S SYNDICS & AL.*

Appeal from the court of the first district.

The delivery of the title transfers the possession of real estate.

If a third person, unauthorised, accept a sale for the vendee, his subsequent ratification will have a retroactive effect.

The plaintiff and appellee demanded, as purchaser, under Samuel Corp, a certain lot of ground, situated, in the suburb St. Mary, adjoining the city of New-Orleans, which was attached by the defendants and appellants, as belonging to the said Corp.

The history of the transactions, which took place between the parties was briefly this.

East'n. District. April 1817.

FLEICHNER vs. GRIEVE'S SYNDICS & AL.

The lot in question was purchased, in 1802, by Samuel Corp, with the funds of the house of William Rowlet & Co. of London, of which he was then a partner. In 1806, he sold it, in conjunction with Rowlet, to Enoch Durand of London, for a sum of money, in which the partnership acknowleged themselves indebted to Durand. The sale was first made by indenture, bearing date of the 21st of July of that year, in London, where the parties then were: and subsequently by a notarial bill of sale, executed in December of the same year, in New-Orleans, where Corp was represented by his attorney in fact, George Pollock, and Enoch Durand by Thomas Elmes, acting voluntarily, in his behalf. On the 25th of August 1811, Durand conveyed the property to the present plaintiff, by a deed of lease and release, which was recorded in New-Orleans, on the 11th of March following, at the request of the plaintiff.

There was judgment for the plaintiff and the defendants appealed.

Livingston for the defendants. The plaintiff has not made out his chain of titles. There is a link deficient in it: for there is no conveyance from Corp to Durand; the latter having failed to ratify the acceptance of Elmes in his name, as

til after the failure of Grieve, in 1811. Nor was this conveyance accompanied by any possession.

II. The plaintiff never accepted the conveyance from Durand.

III. The whole transaction is feigned and tainted with fraud. The conveyance from Corp to Durand, was in fraud of the vendor's creditors. This is clearly inferred from the price, from the vendor remaining in possession and continuing to receive the rents after the sale. The conveyance was a feigned one: intended to cover an usurious loan of money, at ten per cent. which clearly appears from the rent reserved,

IV. The conveyance from Durand to the plaintiff was in fraud of the creditors of Corp, which is clearly inferred from the sum alleged as the consideration of the transfer, from the near relation in which the plaintiff stood to Rowlet, his inability to pay such a sum, and the circumstance that the plaintiff failed to make a demand of the rent in arrear in London, according to the terms of the lease.

Ellery, for the plaintiff. The necessity of a ratification of the acceptance of Elmes is not clear-

Eas'tn. District, April 1817.

FLECKNER vs. GRIEVE'S SYNDICS & AL.

ly seen. No law is cited or referred to, in order to demonstrate it. If a ratification be necessary, no particular form is prescribed; any act evincing an assent on the part of the vendee must be sufficient. He is the only party interested in making, or permitted to make, the objection. At what period soever made by him, the ratification must have a relation back to the period of aeceptance. Here the acceptance of Durand, the vendee, appears by a variety of acts, by the execution of the articles of agreement between him and Corp, signed by both the parties, dated May 12, 1806, by the indenture tripartite, made in pursuance of these articles, between him, Rowlet and Corp, in which this property is conveyed, and the price and payment provided for, on the 21st of the following month, in pursuance of which the act of sale, from Corp to Durand, before P. Pedesclaux, was passed.

The absence of the signature from the indenture is conformable to the English practice, according to which the vendee never signs the deed of sale, nor the lessee the original lease.

The ratification of the acceptance further appears by the lease from Durand to Corp, on the 25th of November 1806, and his sale to the plaintiff on the first of August 1811; and generally by no act of Durand whatever, has the agency

of Elmes been called in doubt; while on the contrary every act of his shews his approval and ratification.

The delivery of the title deeds and the record of the sale in Pedesclaux's office, render a proof of possession unnecessary. The lease of the property by Durand to Corp is an act of ownership and possession, as a tenant always possesses for his landlord.

II. The acceptance by the plaintiff of the conveyance from Durand is evidenced by his record of his deed in Lynd's office, on the 11th of March 1812, by his demand of possession from the syndics, on his first arrival in 1811, and by the institution of a suit against them.

III. Fraud is alleged in the conveyances from Corp to Durand, and from Durand to the plaintiff. But who are the parties who charge this double fraud? Not Corp, who is barred by the judgment of the inferior court, from which he did not appeal, and who in his answer to the petition never tendered this issue, and who, in his answer on oath to our interrogatories, expressly negatives it. Are they the creditors of Rowlet and co. who sold this property, of Samuel Corp, making the firm of Rowlet and

East'n. District. *April* 1817.

FLECKNER vs. GRIEVE'S SYNDICS & AL.

co. at New York, or of Corp individually? These persons as well as Corp individually were always solvent: it is not even pretended that they ever failed or were in discredit. Are they even the creditors of Corp, Ellis and Shaw, of which Corp was a member? Even the firm, if they failed (which has not been *legally* shewn) failed in New York, out of the limits of the state: they are not represented, in this state, and can never appear in this court, but as solvent persons. But, they are not the creditors of Corp, Ellis and Shaw, but of Grieve, said to be a creditor of Corp, Ellis and Shaw, the existence, amount and quality of whose debt still remain to be judicially shewn in a separate case of attachment now pending against Corp, Ellis and Shaw in the city court. Can creditors of creditors, in an endless succession come in and object fraud? Can one set of creditors put themselves at pleasure in the place of another set to make this plea, and then sink back to their own characters to avail themselves of it?

IV. The creditors of Grieve are said to have an interest in this suit. What interest can they have? Should they justify the opposition and even succeed in destroying our title, can they benefit by their success? Our title destroyed, is

whom will this property vest? Not in Corp, Ellis and Shaw to whom it never individually belonged; but in Rowlet and co. with whose funds it was originally purchased. It proceeded from the cargo of the Chesapeake, belonging to Rowlet and co. was bought in at the instance of George Pollock, their agent, to secure a debt due them by Watson, their former agent, and afterwards sold by them to pay a debt of theirs to Durand. The legal title was in Corp, but as an agent and member of this firm. The sales were all made before any of the present actors figured in the scene. The property was bought for Rowlet and co. in 1803, sold to Durand in 1806, before the arrival of Grieve in this country, in 1808, before he was a creditor of Corp, Ellis and Shaw, about the period of their failure, in 1810, before ever this firm was formed, during the existence of the firm of W. Rowlet and co. at London, and Samuel Corp at New York, between which firms and that of Corp, Ellis and Shaw, there never was any mercantile transaction whatever: the latter of which was not formed, during the continuance of the former.

At what period do these syndics of Grieve bring forward this charge of fraud? Not in their regular answer to this suit, in which they all

East'n. District
April 1817.

FLECKNER
vs.
GRIEVE'S SYNDICS & AL.

deny our title, but in a second answer filed on the very moment of trial, and yet they ask, why we did not under our commission (professedly taken out to prove the execution of our deeds and justify our title, put at issue by their answer) procure evidence to rebut the charge of fraud thus suddenly objected. Let us rather ask, why they did not on the contrary avail themselves of it to collect some proof, to justify this charge, which rests only in surmises, gratuitous suppositions and bold assertions.

With what view do they now impute this double fraud? Are they such as will bespeak a favourable hearing? Does not such an attempt, to secure this property to themselves, indicate an intended fraud upon the creditors of Corp, Ellis and Shaw, thus attempting themselves to practice the same kind of fraud which they so gratuitously and unjustifiably impute to us? Who are the parties against whom this charge of fraud is brought? It is attempted to be traced up to Durand, as its source: a man, by their own witnesses, proved to be highly affluent and respectable, unimpeached and unimpeachable, in every respect. But is Durand in court? Can he be stripped of his rights, as well as character, unheard and undefended? In this imputed fraud, Rowlet is made also to participate, but he is

also proved, by their own witnesses to be of the most respectable standing and in the highest credit. By the same fraud, the plaintiff is also to be polluted, against whom the severe investigation, both of private correspondence and confidential conversation, has produced nothing but encomiums upon his character and the confirmation of his title. Yet to believe this scheme and system of fraud, upon which every change has been rung, we must believe (without any visible or assignable motive) the collusive concert of all these parties, to which must be added the perjury of Corp, who has sworn to the truth of his answers to our interrogatories—of the plaintiff, who has sworn to the allegations in his petition and of the principal witnesses, who have testified in this cause. The grounds indeed, upon which these wild suggestions of fraud are sought to be sustained are almost undeserving enumeration or reply. Such as they are, let us look at them.

Exorbitancy of price. If true, is it a proof of fraud or does it not on the contrary rather exclude the suspicion? Were these deeds feigned or fraudulent, would not the parties have chosen a price better suited to their purposes? If a large price were received as a proof of fraud, every hard bargain, upon the failure of the vendor or vendee, would be brought into court to

East'n. District. *April* 1817.

FLECKNER vs. GRIEVE'S SYNDICS & AL.

be set aside, upon the ground of fraud. But the price was not exorbitant, as appears by the testimony of Pollock, and Talcott, from the rent of $3000 received by Pollock, from that required by Grieve, about the time of his failure of $300 per month, from that paid by their witness, Banks, of from $80 to $100 per month for a single house, worth alone, according to his testimony 10,000 dollars. Is it remarkable then that Durand, a man of large property in England, where five per cent. is the highest rate of interest, should purchase real estate in this country, which yielded about ten per cent. and which Pollock informed him was worth 30,000? This more particularly when, as their witness, Urquhart, says the attention of foreigners was then turned to this country and real property bore a price above its intrinsic value.

The rent reserved, *L.*700 sterling, gives exactly ten per cent. it is said, upon the price paid. So would any rent reserved give a per-centage upon the price paid. Had the price been *L.*8000 sterling, then the rent would have given an interest of about eight per cent. upon the price and might as plausibly be urged as a proof of an usurious loan.

It is objected that Corp continued to collect the rent, after the conveyance to Durand. Corp,

as the lessee, collected the rents from the tenants to enable him to pay the rent reserved to his lessor in London, according to the terms of his lease.

It is alleged without any proof of it that the plaintiff was not in a situation to pay for the property and was a relation of Rowlet. The testimony rather shews his ability.

Corp never pretended, nor was he reported, to be owner of the property, after the sale to Durand, but held it publicly as his tenant. It was always known and reported to belong not to Corp, but to some person in London. This circumstance cannot be brought forward by the defendants, syndics of Grieve, who was neither ignorant nor injured by it. He was conscious of the sale, and had been informed of it by Pollock.

Lastly, it is objected that the plaintiff failed at the expiration of the ten days in arrear to make a demand of rent in London, according to the terms of the lease.

This objection yields up at once every pretence of a feigned or fraudulent sale, or an illegal lease. The defendants must admit the validity of the instrument, by the conditions of which they wish to benefit. A demand of rent in London, was unnecessary on account of the ac-

Eas'n. District. April 1817.

FLECKNER vs. GRIEVE'S SYNDICS & AL.

knowleged inability of Corp, to pay since February 1811. *Lex neminem cogit ad vana seu impossibilia.* It was waved by an agreement made with the syndics of Grieve, by which they are to hold subject to the decision of this court, not the rent reserved in the lease, but such rents as they shall receive from the subtenants: by which they discharge themselves altogether of the reserved rent. The necessity of a demand in London is then completely waved, since the syndics do not reside in London, but in New-Orleans, and the rent, by agreement, now to be received is no longer a semi-annual payment, according to the lease, but a payment only to be made on the successful termination of this suit, and no longer of a fixed demandable sum of *L.* 385 sterling, (according to the lease) but the uncertain amount of rents collected and to be collected by the syndics of the subtenants.

By the English law, under which this lease was made, since 4 Geo. 2, the landlord, upon the non-payment of rent for half a year, can serve a declaration in ejectment, without any formal demand of rent in arrear, 3 *Co. Inst.* 202, *a*, *n.* 88, 15 *East* 206, 8 *id.* 341, 365.

As the lease has onerous conditions, the assignees of Corp (if he had been shewn to be insolvent and represented, in this court) were

not obliged to receive it, and must do some act, expressly manifesting their acceptance, it not passing by the general assignment. Suppose for a moment that the syndics of Grieve were the assignees of Corp, then they have, or have not accepted the lease. If they have not, they cannot claim the benefit of any of its acts provisions. If they have, their agreement above cited with the plaintiff waves the necessity of a demand in London. But they are not the assignees of Corp, and the judgment against Corp, in the lower court, without appeal, bars the syndics of Grieve.

The whole term in the lease is now expired, and even if we had no right to re-enter upon the premises by virtue of the clause of re-entry in the lease, upon the expiration of the lease, the possession reverts to us, upon the decision of the court in favour of our title.

DERBIGNY, J. delivered the opinion of the court. Against the validity of these alienations a variety of objections have been raised.

The first in order is that the sale, by Corp to Durand, had not been completed and the property not yet transferred, when the appellants seized the lot as the property of Corp.

The next is, that supposing the sale to have been complete, in point of form, it is void, 1.

East'n. District. *April* 1817.

FLECKNER vs. GRIEVE'S SYNDICS & AL.

as covering an usurious contract of loan: 2. as intended to defraud the vendor's creditors.

The last is that should the sale be decreed valid, in form and substance, the plaintiff ought not to have possession of the premises, because the property is held under a lease.

I. The first, and by far the most important, objection presents the following difficulty. The contract of sale, entered into at London, between Corp and Durand, being for real estate situated in this country, could not affect the rights of third persons here, unless recorded in some notary's office, as required by our laws.—Until then, it must have been considered as having no more force, in this state, than a private bill of sale. The instrument, executed in London, was never recorded here, and therefore never acquired any binding force against the citizen of this state. One of the contracting parties, however, wishing to remove any difficulty, which might occur on that account, caused another instrument of sale of the premises to be executed in this country. But, that sale is objected to as incomplete, because the purchaser who was represented therein solely by a person, who volunteered his services, on that occasion, did not ratify and approve the acceptance made in his

name, until the vendor had become insolvent, and also because he never was put in possession.

Before we examine what must have have been the effect of this second bill of sale, we must refer back the first, and see what was the situation of the parties. An act, which we shall consider as a private one, had been passed between them, by which the property had been conveyed to Durand. He had accepted it and was bound. The contract, as between vendor and vendee, was complete: but, in order to make it binding on other persons, something more was necessary. The instrument was to be recorded, or some public act was to be passed here. Now, such a public act has been passed, by which the public has been notified that Corp divested himself of the property in question and transferred it to Enoch Durand, of London, in whose name Thomas Elmes accepted the conveyance. The instrument is undoubtedly such as ought to have effect against third persons, and tho' Durand might (which we doubt) have a right to decline ratifying it, yet from the moment it was passed, third persons were bound by it, in the case of Durand's subsequent ratification.

But, it is said that Durand never had possession of the premises, under that act. It is law

East'n. District. *April* 1817.

FLECKNER *vs.* GRIEVE'S SYNDICS & AL.

that the delivery of the title is sufficient to transfer the possession of real property. *Part.* 3, 28, 8. *Cur. Phil. Venta, n.* 51. In a country, in which the original title remains deposited, in the office of a notary, such a delivery must be considered as made, when the deed of transfer is there lodged. Then, if Durand, in person or by attorney, had signed the instrument made out, there would be no question as to the delivery & possession having followed, or rather accompanied, the deed. Does it make any difference that instead of an authorised attorney, a voluntary agent accepted the transfer in his name? We think not. The right, accrued to Durand by that acceptance, was certainly the same, whatever might be his subsequent determination.

II. But admitting the sale to be complete in point of form, it is said to be void. 1. as covering a usurious loan: 2, as intended to defraud the venders creditors.

On the first ground, however, supposing that the appellants have a right to set up such a plea, nothing can be shewn than can induce us to view the transaction in that light. Mere conjectures and inferences are not sufficient to shake a contract apparently valid: neither have we heard in support of the second objection, any sufficient

reason to make us consider the contract as fraudulent. It does not appear that when the sale took place, there were any creditors that could be defrauded by it. For several years after, the vendor remained in affluent circumstances, and if any reverse of fortune has befallen him since, the creditors, who lose thereby, have no right to complain of the alienation. The appellants particularly, as representing a creditor, who was the vendor's agent in this country, and as such well informed of his business, and who became his creditor since the sale in question, are in a still more unfavorable situation to set up such a claim.

The title to this property being now fixed in Durand, and nothing having been shewn, which can invalidate the sale by him made to the plaintiff, there seems to remain nothing to do, but to decree possession.

But a difficulty of a singular nature is finally set up by the appellants. They pretend to remain in possession, under Durand, by virtue of the lease which the plaintiff has alleged, against Samuel Corp. In order to avail themselves of such a title, is was expected that they should at least attempt to shew, how that lease passed to them. So far however from that being the case, the question is not even at issue between the present parties: the character of the appellants,

East'n. District. *April* 1817.

FLECKNER vs. GRIEVE'S SYNDICS & AL.

being that of creditors, who have seized the premises, *as the property of Corp*, and who, in their answer in this suit, deny that Enoch Durand or the plaintiff had any title to them.

It is ordered, adjudged and decreed, that the judgment of the district court be affirmed with costs.